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2015 Report of the Ombudsperson for Property Rights

The Office of the Ombudsperson for Property Rights, created in 2006 by House Bill 1944 and located in the Office of the Public Counsel, is tasked with assisting “citizens by providing guidance, which shall not constitute legal advice, to individuals seeking information regarding the condemnation process and its procedures” (Mo. Rev. Stat § 523.277). The ombudsperson is required by § 523.277 to document the use of eminent domain within the state and any issues associated with its use, and shall submit a report to the General Assembly annually on January 1.

Many property owners contacted the Ombudsperson in 2015 with a wide variety of eminent domain questions. The guidance provided by the Ombudsperson included, but was not limited to, the following issues:

- the procedural timeframe involved in the condemnation of property;
- the steps a municipality must take to condemn property;
- the valuation of property subject to condemnation;
- the heritage value of property taken by eminent domain;
- how to address errors in a municipality’s appraisal;
- the selection of commissioners in a condemnation proceeding;
- access to the Missouri Department of Transportation’s records regarding property sought to be acquired by eminent domain;
- how to make a counter-offer to a municipality seeking to acquire property;
- negotiating the value of trees being removed pursuant to eminent domain; and
- the authority for a permanent construction easement for a private developer.

The below data includes summaries of specific 2015 projects involving eminent domain and summaries of relevant Missouri and Federal case law regarding eminent domain.

A. Noteworthy Missouri Projects Involving Eminent Domain in 2015

1. Grain Belt Express

The Grain Belt Express is a proposed 750-mile overhead power transmission line that would deliver wind-generated power from Kansas through Missouri (Buchanan, Clinton, Caldwell, Carroll, Chariton, Randolph, Monroe and Ralls Counties) to states further east. On July 1, 2015, the Missouri Public Service Commission (“MPSC”) denied the request for a certificate of convenience and necessity authorizing Grain Belt Express Clean Line, LLC (GBE) to construct, own, operate, control, manage and maintain the proposed electric transmission line. The MPSC concluded that GBE failed to satisfy its burden to demonstrate that the project is necessary or convenient for the public service (MPSC Case No. EA-2014-0207). Despite the MPSC’s decision, GBE’s website states that it will continue pursuing this project.

2. Rock Island Trail

In February 2015, the federal Surface Transportation Board issued a Notice of Interim Trail Use or Abandonment (NITU) affecting approximately 144 miles of the abandoned Rock Island Railroad corridor through Missouri (Cass, Pettis, Benton, Morgan, Miller, Cole, Osage, Maries, Gasconade and Franklin Counties). The NITU was requested by the Missouri Department of Natural Resources in order to convert the abandoned railroad corridor to a recreational hiking and biking trail under the National Trails Act. The ultimate goal is to connect the Rock Island Trail with the existing Katy Trail to form a 459-mile biking and hiking trail loop.

In response to the NITU, 237 landowners along the railroad corridor filed a lawsuit in the United States Court of Federal Claims on March 2, 2015, claiming that the change to recreational usage is a new easement and a new taking of property that requires just compensation. The lawsuit, *Abbott v. United States*, is currently pending in Case No. 15-CV-211.



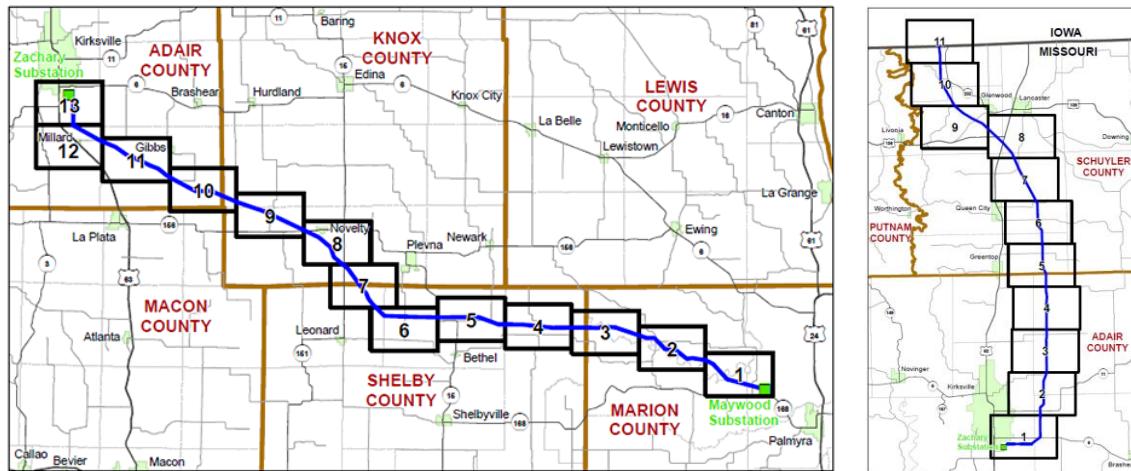
Map source: <http://rockislandtrail.org/about/>

3. Mark Twain Transmission Project

In May 2015, the Ameren Transmission Company of Illinois (ATXI) filed an application with the Missouri Public Service Commission (MPSC) seeking authority to build and operate an electric transmission line in northeast Missouri, which Ameren has referred to as the Mark Twain Transmission Project. The 97-mile transmission line is proposed to run from Palmyra to

Kirksville (through Marion, Shelby, Knox and Adair Counties), and then turn north into Iowa (through Adair and Schuyler Counties). Construction of the line would require a 150 foot easement across private land for approximately 95 miles, and a 100 foot easement for 2 miles.

ATXI's proposal is being opposed by the not-for-profit corporation, Neighbors United Against Ameren's Power Line, which includes 375 property owners, including owners of the property that ATXI proposes to cross with the line. Evidentiary hearings are currently scheduled before the MPSC for late January 2016 (MPSC Case No. EA-2015-0146).



4. National Geospatial-Intelligence Agency

The National Geospatial-Intelligence Agency (NGA), currently located in south St. Louis, is planning to relocate its headquarters, and has stated its intention of choosing a location by April 2016. Of the four proposed locations being considered, one option is a 100-acre site in north St. Louis. In February 2015, the St. Louis Board of Alderman issued an ordinance (#69977) that declared the site to be blighted and in need of redevelopment. In order to meet the NGA's directive that the property be assembled and consolidated under common ownership as a condition of its selection of a site for relocation, the Land Clearance for Redevelopment Authority of the City of St. Louis (LCRA) has undertaken the project of acquiring all property in the prospective relocation site. Most of the property within the site has either been acquired or an agreement has been reached with the property owner that the City would acquire the property should the NGA choose the St. Louis site. For the remaining parcels that have not been acquired, the St. Louis Board of Alderman passed a resolution authorizing the LCRA to file eminent domain proceedings in circuit court to take the property. On December 29, 2015, the LCRA filed the first eminent domain petition in the circuit court of the City of St. Louis requesting that "the land, properties, interests, and rights herein described be and stand condemned, and extinguished, and that fee simple absolute title to the parcels set forth above be vested in" the LCRA (Case No. 1522-CC11386).

5. Cerner Corporation's Trails Campus

In 2013, the City Council of Kansas City passed an ordinance approving the Bannister & I-435 Tax Incremental Financing Plan and designated a Redevelopment Area, which it concluded was blighted as a whole. The primary occupant of the new Redevelopment Area will be Cerner Corporation's new \$4.5 billion Trails Campus, which Cerner began constructing in July 2015. In 2014, Kansas City amended the Redevelopment Plan and expanded its area, incorporating property at 6101 East 89th Street, which is owned by Mukhi Hospitality Group, LLC and occupied by two motels (the Capital Center Inn and A1 Inn Kansas City), and property at 9251 Hillcrest Road, which is owned by KC Benjamin, LLC. Two blight studies were conducted: Belke Appraisal & Consulting Services, Inc. was retained by the Economic Development Association of Kansas City, Missouri to conduct a blight study, and it concluded the area is blighted; and Integra Realty Resources was retained by Cerner Property Development to conduct a blight study of the motel properties, and it also concluded the property is blighted. According to the Redevelopment Plan, the new site will be used by Cerner, in part, for "an approximately 300,000 square foot conference/training center which will include accommodations for visiting guests/employees."

In 2015, the City of Kansas City filed eminent domain petitions in the Circuit Court of Jackson County seeking authority to take properties within the amended Redevelopment Area that did not accept the City's offer of purchase. Those cases are pending in Case No. 1516-CV02035, regarding the property at 9251 Hillcrest Road, and Case No. 1516-CV24871, regarding the property at 6101 East 89th Street.

6. Missouri Department of Transportation Projects

The Missouri Department of Transportation (MODOT) exercised eminent domain in 2015 to acquire realty rights for projects in MODOT's Statewide Transportation Improvement Program. According to MODOT, in fiscal year 2015, MODOT acquired a total of 335 parcels of real property. Of those 335 parcels, 330 parcels were acquired without the need for condemnation (they were acquired by negotiation), and 5 parcels were acquired through condemnation.

At the conclusion of an acquisition, MODOT provides each property owner with a survey asking each to rate MODOT's performance on a scale of 1 to 5 in regards to the acquisition, with a 1 rating indicating complete dissatisfaction, and a 5 rating indicating very satisfied. MODOT reports that its statewide satisfaction rating for FY2015 was 4.7.

7. Miscellaneous Municipal and Other Projects

A number of Missouri municipalities exercised their power of eminent domain in 2015 by filing eminent domain petitions in Missouri's circuit courts. Cities exercising such authority include, but may not be limited to, the cities of Cape Girardeau, Columbia, Cottleville, Cuba, Eureka, Grandview, Independence, Jefferson, Joplin, Kansas City, Lee's Summit, Maplewood, Maryville, Olivette, Peculiar, Sedalia, St. Charles, St. Joseph and St. Louis. Most of these municipal condemnations involved road and sewer improvements, but also included takings involving park expansion, airport expansion, and redevelopment plans. Eminent domain was also exercised by the St. Louis Housing Authority for its "North Sarah, Phase III" project, wherein it seeks to acquire properties for a redevelopment plan that includes the construction of

72 mixed-income apartments and townhomes “to provide safe, decent, and sanitary housing to low-income families.” In addition, petitions were filed in 2015 against several municipalities for *inverse condemnation*, which is a taking that is not compensated, and most involved city sewer systems that overflowed onto the petitioner’s property and caused damage.

B. Eminent Domain Cases in Missouri Appellate Courts

Below is a summary of a few of the more noteworthy eminent domain cases from 2015 in the Missouri appellate courts.

1. *Labrayere v. Bohr Farms, LLC*

458 S.W.3d 319 (Mo. 2015)

The Missouri Supreme Court heard a challenge to Mo. Rev. Stat. § 537.296, which provides the compensatory damages that may be awarded to a claimant for a private nuisance where the alleged nuisance emanates from property primarily used for crop or animal production purposes. The Plaintiff claimed that the statute authorized an unconstitutional private taking because it effectively provides the right of eminent domain to private companies. The Court held, “To the extent, if any, that section 537.296 effectuates a taking, the taking advances a legitimate public purpose (promoting the agricultural economy) and, therefore, meets the ‘public use’ requirement.”

2. *Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*

2015 Mo. App. LEXIS 188 (Mo. App. Feb. 24, 2015)

This case involves a construction error during the City of Bellefontaine Neighbors' street improvement project that resulted in damage to Metropolitan St. Louis Sewer District's sewer lines under the street. The issue was whether one political subdivision may sue another political subdivision for inverse condemnation. The Court stated that it has been previously established that where a city does not initiate formal condemnation proceedings, but nevertheless appropriates or damages *private* property through the course of some city project, inverse condemnation is the cause of action through which to raise a claim of unconstitutional takings under Mo. Const. art. I, sec. 26. In this case the city damaged property solely for *public* use. The Court concluded that there is “no precedent in Missouri for including public property under the blanket of the state constitutional protection for private property...It is likely that our Missouri Supreme Court would logically extend inverse condemnation in Missouri to protect public property from damage by a city project, especially where, had the same project damaged a private landowner's property, an action for compensation under inverse condemnation is readily available with no obstacle of sovereign immunity. However, absent legislative authority or Missouri Supreme Court guidance, we cannot read the word "public" into the plain constitutional language of protection for "private property." As an intermediate court of appeals, that is not our place.” The Court concluded that “because of the importance of this question, we transfer to the Missouri Supreme Court.” The case has been argued before the Missouri Supreme Court and a decision is pending in Case No. SC94831.

C. Eminent Domain Cases in Federal Courts

The following 2015 federal cases involving eminent domain are of note for their potential impact in Missouri:

- 1. *World Trade Farmers Market, Inc. v. American Airlines, Inc.***
802 F.3d 315 (2nd Cir. 2015).

The U.S. Court of Appeals held that, in the context of just compensation for takings, ordinarily the fair equivalent of the actual loss sustained by a property's owner is the property's market value. However, some property is of a kind seldom traded, such that it lacks a market price and, therefore, must be compensated for according to its replacement cost. But this class of specialty property is narrow; reproduction cost should be utilized only in those limited instances in which no other method of valuation will yield a legally and economically realistic value for the property. Churches, hospitals, clubhouses and like structures commonly fall within this category because the building may be regarded by the organization that owns and utilizes it as worth everything it cost to construct and more, yet it may not be 'marketable' because no similar group would have sufficient need for the property to be willing to purchase it.

- 2. *Equitrans, L.P. v. 0.56 Acres More or Less of Permanent Easement Located in Marion Co.***
2015 U.S. Dist. LEXIS 155754, 14-16 (N.D. W. Va. Nov. 18, 2015).

The U.S. District Court addressed a claim that the taking of property for a gas pipeline was not a public purpose and would, therefore, violate the Fifth Amendment's Takings Clause. The Court rejected this claim and concluded, "By enacting § 717f(h), Congress concluded that the taking of rights-of-way to build natural gas pipelines is a public use, as it furthers the public interest in "the business of transporting and selling natural gas for the ultimate distribution to the public." 15 U.S.C. § 717(a). Section 717f(h)'s delegation of condemnation power furthers a legitimate public interest and does not violate the Fifth Amendment."

- 3. *United States ex rel. TVA v. An Easement & Right-of-Way over 6.09 Acres of Land***
2015 U.S. Dist. LEXIS 145589, 11-12 (N.D. Ala. Oct. 21, 2015).

The U.S. District Court held that in eminent domain proceedings seeking to determine just compensation, the fair market value that a hypothetical, 'reasonable man' buyer will purchase land for should consider not only its existing use but to other potential uses as well. Fair market value takes into consideration the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future.

- 4. *Charlottesville Div. v. Dominion Transmission, Inc.***
2015 U.S. Dist. LEXIS 132554, 28-29 (W.D. Va. Sept. 30, 2015)

The U.S. District Court concluded that all states have codified the common-law privilege to enter private property for survey purposes prior to exercising eminent domain authority. Legal challenges to the validity of such statutes on the basis that they affect a taking without just compensation have been consistently rejected.

5. *Gunpowder Riverkeeper v. FERC*
2015 U.S. App. LEXIS 12532 (D.C. Cir. 2015)

The D.C. Circuit Court concluded that it is not necessary in order to show injury that property already have been taken, or even that eminent domain proceedings have begun; it is enough that they have been deemed authorized and will proceed absent a sale by the owner.

D. Conclusion

The taking of private property from individuals and businesses through eminent domain continues to be a controversial practice. In 2015, the Ombudsperson helped ease the burden placed upon many such property owners by providing guidance on the condemnation process. While most property owners subjected to eminent domain would benefit from legal representation, for many property owners, hiring an attorney to represent their interests in a condemnation proceeding is not within their budget or not worth the cost when the taking is minimal. For these unrepresented property owners, the Ombudsperson's guidance was most valuable, and the feedback received by such property owners was positive and supportive of the role the Ombudsperson plays in the process.

For questions or concerns about this report, please call Marc Poston, Chief Deputy Public Counsel, at 573-751-5558.

Sincerely,

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